

Doctrine of Fair Dealing

Doctrine of Fair Dealing is an exception to the law that would usually protect any material that would be considered to be copyrighted as under the Indian Copyright Act, 1957 (hereinafter known as the "**Act**"). It is a legal doctrine which permits a person to use any work which is protected under the Act with limited usage of such work so as to maintain the sanctity and originality of such work as well as the registered proprietor of the work.

The meaning of "**Fair Dealing**" depends on different facts and circumstances. In India, the Court applies basic common sense so that they can determine as to what can be constituted as Fair Dealing on the case- to- case basis. Fair dealing is a significant limitation on the exclusive right of the copyright owner. It has been interpreted by the courts on a number of occasions by judging the economic impact it has on the copyright owner. Where the economic impact is not significant, the use may constitute fair dealing. The fair nature of the dealing depends on the following four factors:

1. the purpose of use;
2. the nature of the work;
3. the amount of the work used, and
4. the effect of use of the work on the original.

In consonance with the UK Copyright laws, India has adopted the concept of Fair Dealing for the past years. On the other hand, the same concept is known as "**Fair Use**" under U.S. Copyright laws. Cases such as *Gyles vs Wilcox* which had established the concept of "**Fair Abridgment**" and *Folsom vs Marsh* have established the concept of what Fair Dealing is. These cases acted as precedents to the Indian cases which will be discussed in brief later in this assignment.

In the recent amendment that has been made in the Act known as the Copyright (Amendment) Act, 2012, the concept of Fair Dealing has also included works in the line of musical or cinematographic in nature. The reason for this is that since both personal and private works have been amended in the recent Act except work done in the line of computer programming, the scope has become much wider to consider what can be considered to be Fair Dealing under the Indian Regime. Also, Fair Dealing has been considered to benefit disabled persons who can now access works including sharing with any person with a disability for private or personal use, research or for any other educational purposes.

To know more about Fair use please visit

What do you mean by Fair Use under the Indian Copyright Act?

Under Indian regime legal framework being the Copyright Act, 1957, section 52 lays down certain acts or works that cannot be considered as an infringement of copyright namely fair dealing with a literary, dramatic, musical or artistic work not being a computer program for the purposes of-

- fair dealing with any work, not being a computer programme, for the purposes of—
 - (i) "private or personal use, including research;
 - (ii) criticism or review, whether of that work or of any other work;
 - (iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public.
- the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;
- transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy:
- the reproduction of any work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding;

The Court along with the above mentioned provision, also relies upon classic cases which has been dealt in brief in the next chapter as to what and up to how much extent any work which is abridged as under the Act can be considered to be "Fair Use" of the copyrighted work which in fact, is an extremely technical based issue that is seen by the Court mainly looking into the fact of the case.

[Click Above](#)

International Cases

- **Hubbard vs Vosper-** In the line of dealing with the concept of Fair Dealing, Lord Dennings has stated that "***It is impossible to define what is "Fair Dealing". It must be a question of degree. You must first consider the number and extent of the quotations and extracts.... then you must consider the use made of them...Next, you must consider the proportions...other considerations may come into mind also. But, after all, is said and done, it is a matter of impression***".

- **Gyles vs Wilcox**– This case had initially established the doctrine of "**Fair Abridgment**" which eventually came to be known as "**Fair Dealing**" which was the first case based on the concept of Fair Use law as was adjudicated by the Court of Chancery of England. In this case, the Court adjudicated the issue of whether work which comes within the purview of copyright can be abridged or such abridged are to be considered as new work, separate to that of abridged work. In that regard, Lord Hartwicke established two categories under which such abridged work would be classified into firstly, "**True Abridgments**" which in itself explains that the work was created at its truest form without violating the copyright. While the other being "**Coloured Shortenings**" which is the colouring or certain adjustments made to the original copyrighted work.
- **Folsom vs Marsh**– This case was the first-ever case of "**Fair Use**" in U.S. wherein, Justice Story has set forth the following four factors to determine a work to be of Fair Use, which later went to be codified under the Copyright Act, 1976:
 1. "**The nature and objects of the selections made;**
 2. The nature of the original work;
 3. The amount is taken; and
 4. The degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."

Indian Cases

- **India TV Independent News Services Pvt. Ltd. vs Yashraj Films Pvt. Ltd-** The facts of this case state that the defendants that is, India TV broadcasted a show on its channel documenting the life of the singers wherein the singers were shown to perform their own songs however, while such performance was being filmed clips of a movie scene were shown to play in the background. The plaintiff, that is, Yashraj Films Private Limited claimed that such a scene of the movie in the background amounts to infringement of its Copyright. The defendants took the defence of fair dealing under Section 52. The Delhi Court dismissed the defence of fair dealing and restrained the defendants from the production, distribution and broadcasting or in any way exploiting any cinematograph film, sound recording or part thereof which is owned by the Plaintiff. This litigation battle went on for years, where different angles and viewpoints were considered, in an appeal from the above order, the Hon'ble bench of Delhi High Court also felt the need to overlook the conventional approach of dealing with Section 52 of the Copyright Act, the bench set aside the order passed by the single Judge and uplifted the restrictions so imposed. However, the Appellants were still prohibited from broadcasting any cinematograph film without the appropriate permission. It was through the Copyright (Amendment) Act, 2012 that fair dealing as a concept brought within its scope musical recordings and cinematograph films.
Through this case the Indian legal system made advancement in the field of fair dealing under Copyright by overlooking the rigid and conventional approach and implementing the necessary changes.
- **Civic Chandran vs Ammini Amma-** In this case, the Court considered that a parody did not constitute an infringement of copyright as long as it has not been misused or misappropriated. In consonance with this case, the Court established the following three tests which is to be taken into consideration to determine work to be an infringement of copyright:

1. "the quantum and value of the matter taken in relation to the comments or criticism;
2. the purpose for which it is taken; and
3. the likelihood of competition between the two works."

How can fair use be incorporated as a defence in Copyright Infringement Litigation?

When a person is faced with Copyright infringement litigation, he/she can adopt either of the two strategies as a defence;

1. They can challenge the Copyrightability of the work
2. Argue that the work was well within the ambit of fair dealing under Section 52 of the Copyright Act, 1957.

The United States Copyright Law specifies several factors in order to determine whether the acts fall within the ambit of fair use, the Indian courts have accepted these factors too in order to determine whether an act constitutes a fair dealing as provided under Section 52 of the Copyright Act, 1957 or else it amounts to infringement of a Copyright.

The factors are as follows:

- The purpose and character of the **use** of such work, it has to be determined whether the work is of commercial nature or for a non profit/educational purpose.
- **Nature** of the Copyrighted work.
- The **portion used** as a part of the Copyrighted work as whole.
- The **effect** of the use of such work on the market or value of the copyrighted work.
- Not a **substitute** for the original work.
- Also, is **transformative** in nature that is, adds new meaning and message to the original.

If these factors are present in a work it can be dealt under the scope of fair dealing and in a Copyright litigation the defence would have to prove how his/her work has incorporated all the above mentioned factors so as to not result in **infringement** of a Copyrighted work.

The factors are thoroughly considered by the courts before determining as to whether the work can be considered within the scope of fair dealing.

In the United Kingdom an exception to Copyright Infringement is prevalent in the form of fair dealing. However, the fair use is limited in scope as it only extends to research, private study, criticism, review and news reporting and it is irrelevant whether fair use is for general use or for a purpose not specified in the Copyright, Designs and Patents Act, 1998.

The European Commission released a communication about the new European Copyright framework at the end of 2015. The main highlight of this framework is to increase the levels of harmonization, **make relevant exceptions mandatory for member states** to implement and ensure that it functions across the borders within the EU. The Canadian

courts have also found more flexibility in the country's fair dealing statute moving it substantially closer to a fair use model without abandoning the fair dealing framework.

How is fair dealing disadvantageous to the owner of a Copyright?

There has always been a thin line of difference between **Infringement** and **Fair Dealing**. Section 52 of the Copyright Act 1957 does not permit the reproduction of the whole work. Such substantial copying and reproduction of the whole of the work would amount to infringement however; one of the major loopholes present in the Indian Copyright Act is that it does not define what substantial or insubstantial portion of the Copyright work is. As per the legal interpretation of the provision it is clear to one and all that only the insubstantial portion of the original copyright work comes within the ambit of fair dealing. The question of whether a work is fair dealing or not is a qualitative one that differs from case to case.

In the case of "**The Chancellor, Masters and Scholars of the University of Oxford v Rameshwari Photocopy Services (CS (OS) 2439/2012, I.As. No. 14632/2012)**" in this case it was held that "making course packs for suggested reading for students by photocopying portions of various prescribed reference books does not violate the copyright of the publishers." The facts of the case state that the plaintiffs were Oxford University Press, Cambridge University Press and its Indian affiliate, Taylor & Francis and its Indian affiliate. They filed a suit for permanent injunction restraining Rameshwari Photocopy Services and via Delhi School of Economics, Delhi University from infringing copyright owned by them in various publications which have been photocopied and distributed to students in course packs. The course packs reproduced selected portions of copyright protected materials ranging between 5% to 33.25% of the original books. The Delhi School of Economics' portion never required the entire packs to be reproduced; only selected portions were contained in the pack. The issues raised within the case were as follows:

1. Whether unauthorised distribution and reproduction were infringing acts?
2. Would the provision of course packs cause Delhi University to directly compete with the plaintiffs in the market for textbooks in the field of education?
3. Did the production and redistribution of such copyright content violate the licensing scheme administered by the Indian Reprographic Rights Organisation?
4. Was the interpretation of the Indian Copyright Act in accordance with the international copyright treaties and comparative legislations provided for in other countries?

However, the Judgement is silent on the question as to whether, in the Court's opinion, is the reproduction of the whole book allowed or only reproduction of excerpts from several books would be allowed? The verbatim lifting of content from various books would amount to copyright infringement as per the provision of the Copyright Act, 1957 and therefore the Judge needs to thoroughly consider various aspects before giving its opinion on whether a work constitutes fair dealing or not.

Conclusion

It can be safely concluded that the test to determine a copyrighted work as a Fair Use of such work indeed differs from case to case since such facts are to be given high priority more than the law itself. Though the legislature has attempted to make law on this concept

more flexible but precise, in the Indian scenario, section 52 of the Copyright Act, 1957 makes a legitimate stand for the public to rely upon this provision for now. As mentioned under Article 13 of the TRIPS (Trade-Related Aspects of Intellectual Property Rights) which reads as follows:

"Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder".

India has been able to establish a proper ground as for now since the whole idea having an exception as against the protection of copyright is to give rise to creativity and growth which can be transformed and expressed in many other new ways so as to encourage people to attain such degree of creativity with careful consideration to the original copyrighted work.

Endnotes

1. Lexology, Exceptions to copyright infringement – fair dealing,
2. (1740) 26 ER 489
3. 9. F.Cas. 342 (C.C.D. Mass. 1841)
4. Supra note 1
5. Supra note 1
6. 1972) 1 All ER 1023 p. 1027
7. Supra note 3
8. FAO(OS) 583/2011
9. 1996 PTR 142
10. Mondaq, India: "Fair Dealing" In Copyrights: Is The Indian Law Competent Enough To Meet The Current Challenges?